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Lisa Gerson
Attorney at Law
lgerson@mwe.com
+1 212 547 5769

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BY ECF

The Honorable Vernon S. Broderick
United States District Court
Southern District of New York
Thurgood Marshall United States Courthouse
40 Foley Square
New York, New York 10007

Re: Commonwealth of Pennsylvania v. Exxon Mobil Corp., et al., Case No. 14-cv-06228

Dear Judge Broderick:

The parties respectfully submit this joint letter, pursuant to Local Rule 37.2 and Your Honor's Individual Rule 3, on Defendants' motion to compel Plaintiff to produce, within 45 days, ESI responsive to Defendants' requests for production, or in the alternative request an informal conference with Your Honor. The letter presents Defendants' position, followed by Plaintiff's.

I. DEFENDANTS' POSITION

A. The Parties Have Been Unable to Resolve This Dispute Through Meet and Confer

Despite Defendants' efforts to meet and confer in person and by telephone, Plaintiff continues to delay and frustrate the discovery process by failing to produce electronically stored information ("ESI") responsive to Defendants' discovery requests. Contrary to the Federal Rules of Civil Procedure and Orders in this case, Plaintiff contends this litigation has not yet reached a "phase" of discovery during which it must produce ESI.

Since at least April 2016, the Parties met and conferred telephonically, in person, and in repeated written exchanges, all to no avail. When the Parties were not able to reach agreement on a plan for producing ESI after meeting and conferring by telephone on April 25, 2016 and a subsequent exchange of emails and letters, Plaintiff stated it was "proceeding with its ESI collection and review in accordance with its obligations under the Federal Rules of Civil

Procedure and accepted litigation standards." *July 13, 2016 Letter from T. O'Reilly to S. Geppert*, at 4.

The Parties met and conferred in person on September 1, 2016 to discuss a number of issues, including Defendants' concerns about Plaintiff's failure to produce ESI. Plaintiff suggested an additional meet and confer was necessary, even though Plaintiff already had stated its intention to proceed with ESI collection and production pursuant to the Federal Rules, and Defendants had understood such collection to be underway. *Sept. 8, 2016 Letter from A. Bongiorno to D. Miller & M. Axline; Sept. 16, 2016 Letter from T. O'Reilly to L. Gerson.*

The Parties have not made further progress by meeting and conferring. After waiting months for an ESI production, Defendants again attempted to meet and confer with Plaintiff. During conference calls on December 15 and 22, 2016 and a subsequent email exchange, Plaintiff continued to maintain that ESI is off-limits and was unprepared to provide a timeline for its eventual production of ESI. Plaintiff did not respond to Defendants' request for an additional call to discuss this timeline by January 13, 2017 as requested. *Dec. 22, 2016 Email from A. Bongiorno to T. O'Reilly*; *Jan. 4, 2017 Email from M. Han to A. Bongiorno.*

B. Plaintiff Has Failed to Meet Its Obligation to Produce ESI

Plaintiff's obligation to collect and produce ESI in this case was triggered by Defendants' First Set of Non-Site Specific Interrogatories and Requests for Production of Documents to Plaintiff in May 2015. Today, more than one-and-a-half years after Defendants' first document requests, Plaintiff has yet to make a comprehensive ESI production in response to those or subsequent document requests, including Requests for Production of Documents that Defendants served in October 2015, November 2015, November 2016, and in deposition notices from June 2016 through December 2016.[1]

The Commonwealth has admitted that it has produced only limited ESI. In response to Defendants' repeated requests for productions that include ESI, Plaintiff claims—without citation to any authority in support—that this case is not yet in the "ESI phase" of discovery. *See*, *e.g.*, *Nov. 30, 2016 Letter from M. Han to J. Anderson*. Rule 34 does not contemplate such a "phase," nor does any Order in this matter. Case Management Order 119 imposed certain limitations on the production of ESI, but those limitations applied *only* to disclosures made pursuant to that Order and not to any other discovery. Indeed, Case Management Order 121 unambiguously confirmed that non-site specific and general liability discovery is fully open. *See* Case Management Order No. 121 § I ("To the extent any limitations previously existed on the scope of non-site-specific discovery, such limitations are removed . . . ."). Plaintiff has no basis to limit its document collection and production obligations to only non-ESI.[2]

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[1] Defendants' deposition notices to individual witnesses include document requests that almost exclusively request documents only to the extent those documents were not otherwise produced in response to Defendants' previously-served document requests. Defendants included these requests because Plaintiff failed to provide complete responses to the original discovery requests.

Plaintiff has repeatedly asserted that it has produced some ESI. That is true. However, much of that ESI was produced pursuant to directives in Case Management Order 119 and not in response to Defendants' document requests. *July 13, 2016 Letter from T. O'Reilly to S. Geppert*, at 2. With respect to the limited ESI that Plaintiff produced in response to discovery requests, the Commonwealth's efforts have been woefully incomplete and do not absolve it of its duty under Rule 34. Commonwealth personnel have testified that they chose the search terms with no input from counsel, and collected from limited locations. Further, Commonwealth employees have testified to deleting ESI related to issues in this case long after Plaintiff first contemplated this litigation. Plaintiff's delay in collecting and producing ESI therefore leaves information responsive to Defendants' discovery requests vulnerable to destruction.[3]

Notwithstanding Plaintiff's failure to comprehensively produce ESI, Defendants have attempted to proceed with discovery in this case. But Defendants' efforts to conduct meaningful discovery, including depositions, have been hamstrung by Plaintiff's refusal to produce ESI. Defendants' document requests are aimed at discovering information related to Commonwealth programs that are central to Defendants' defenses. For the foregoing reasons, Defendants respectfully request that Your Honor compel Plaintiffs to produce ESI in accordance with the Federal Rules of Civil Procedure within 45 days.

II. PLAINTIFF'S POSITION

Plaintiff Commonwealth of Pennsylvania ("Commonwealth") respectfully submits its position concerning the production of Electronically Stored Information ("ESI") in this matter. The request that the Commonwealth produce all ESI within 45 days is unfair, unworkable, and directly contrary to Judge Scheindlin's prior directives. The Commonwealth requests that defendants' motion be denied, and that defendants be ordered to meet with the Commonwealth to jointly prepare a comprehensive ESI plan which applies to both sides.

First, it is extremely important to understand that the Commonwealth and defendants have proposed vastly different approaches to discovery and trial in this matter. Defendants have proposed that trials should be phased and the first phase should be limited to a relatively small number of gasoline stations. The Commonwealth has proposed a single trial with statewide damages based, in part, on statistics. While this issue was raised with Judge Scheindlin, it was not resolved.[4] It is premature and wasteful to demand vast amounts of discovery without any assurance that it will ultimately be relevant to the issues at trial.

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[2] Plaintiff also has repeatedly, but incorrectly, asserted discovery has been limited to "readily available information." It is unclear whether Plaintiff also is standing on this alleged limitation as grounds for failing to produce ESI. As with the purported "ESI phase" of discovery, no order in this case nor any Federal Rule of Civil Procedure supports such a limitation.

[3] To the extent Plaintiff responds to this letter-brief by arguing that Defendants have not produced ESI, that issue is a red herring. Not only are Defendants differently situated both from Plaintiff and from each other, but Defendants already have responded to interrogatories regarding their ESI productions. To the extent Plaintiff believes there are outstanding issues with any particular Defendant's ESI production, Plaintiff must meet and confer with that Defendant individually, which it has not done.

Second, defendants do not identify a single request for ESI that has been served on the Commonwealth. Defendants served approximately 119 document requests (with subparts), 51 individual deposition notices with 12-15 document requests each (approx. 765 total), and 5 Rule 30(b)(6) deposition notices with 21 document requests.[5] Defendants thus take the position that the Commonwealth is obligated to search all ESI in response to each new document request. Defendants literally contend that the Commonwealth should conduct 905 separate ESI searches. The departments from which defendants seek discovery contain over 3,000 employees, each with computers or laptops as well as hundreds of servers, email accounts, and other storage media. Defendants' position is untenable and contrary to accepted ESI discovery practices.

Experts on electronic discovery recommend that "[t]he parties meet and confer on the nature of each other's computer hardware and software applications." (George L. Paul & Jason R. Baron, *Information Inflation: Can the Legal System Adapt?*, 13 Rich. J.L. & Tech. 10 (2007) at 52.) Judge Scheindlin's guidebook similarly states that parties have an obligation to meet and confer as to mutual ESI collection and production plans and processes. (*See* Scheindlin, Capra, and The Sedona Conference, *Electronic Discovery and Digital Evidence in a Nutshell* (West 2009) at pp. 98-100.) Courts in the Southern District have also endorsed the principle that "[e]lectronic discovery requires cooperation between opposing counsel . . ." (*William A. Gross Const. Associates, Inc. v. American Mfrs. Mut. Ins. Co.* 256 F.R.D. 134, 136-137 (S.D.N.Y 2009); *see also S.E.C. v. Collins & Aikman Corp.* 256 F.R.D. 403, 414-415 [Judge Scheindlin found parties were required to work cooperatively to develop "workable search protocol . . ."]. This is exactly the process contemplated by the relevant Case Management Orders entered in this matter: "the parties are to meet and confer regarding production of electronically stored information," (*See* Dkt. 158, CMO #119 at 7-8, Sect. VI.A&C; *see also id.* at 7; *see also* Dkt. 4429, CMO #121 at 3, Sec. V.) Defendants contention that the Commonwealth alone was obligated to "make a comprehensive ESI production" is wrong.

Third, the Commonwealth has already produced substantial ESI (163 gbs) in response to defendants' discovery requests: over 3,000 emails, approximately 1,101 Excel spreadsheets, and 126 Microsoft Access databases, all in native format. Even though not required to do so, the Commonwealth also produced its entire Oracle enterprise database (eFACTS) (along with 158,000 files of native data in eFACTS) which is used by the Department of Environmental Protection on a daily basis. The Commonwealth has also produced 11 million pages of documents. In short, contrary to defendants' representations, the Commonwealth has gone above and beyond its discovery obligations by producing a substantial and comprehensive amount of ESI.

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[4] Defendants have not even served their answers.

[5] The Commonwealth previously served a motion for protective order concerning these deposition notices as defendants refused to meet and confer concerning the number and scope of document requests. Despite subsequent efforts by the Commonwealth, defendants have steadfastly refused to narrow the scope of these requests, and have continued to serve eight deposition notices a month.

Finally, defendants' assertion that defendants are proceeding with the gathering and production of ESI is not borne out. In August 2016, defendants claimed that by 2014, when the Commonwealth filed this action, it "already had the vast majority of ESI for most Defendants named in this litigation." Defendants, however, admit that they have not produced any ESI in response to the Commonwealth's discovery requests. When the Commonwealth served interrogatories asking defendants to identify all relevant previously produced ESI, not one single defendant identified ESI. Instead, defendants universally claimed that they could not identify any previously produced ESI, or it was too difficult to identify prior ESI productions. In short, defendants have not produced a single byte of ESI to the Commonwealth, and have steadfastly refused to produce any ESI to the Commonwealth. Contrary to defendants' claims, the Commonwealth has sent repeated requests for meetings to prepare a comprehensive-mutually applicable ESI proposal.[6] Defendants have rebuffed these offers, and instead continue to demand that the Commonwealth unilaterally produce vast amounts of ESI on unspecified subjects.

Defendants' request seeks to impose a one-sided, improper, overly burdensome, and physically impossible, obligation on the Commonwealth while avoiding any reciprocal obligation for defendants. The Court should reject defendants' request. The Court should, instead, order defendants to (1) agree to a universal and mutually applicable ESI production protocol which allows each side to complete ESI production in a single process, and (2) agree to produce ESI in response to the Commonwealth's request.

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Respectfully submitted,

FOR DEFENDANTS

/s/ Lisa Gerson

Lisa Gerson, Esq.
McDermott Will & Emery LLP
340 Madison Avenue
New York, New York 10173
(212) 547-5400

FOR PLAINTIFF

/s/ Tracey O'Reilly

Tracey O'Reilly, Esq.
Miller & Axline P.C.
1050 Fulton Ave # 100
Sacramento, California 95825
(916) 488-6688

cc: All Counsel of Record by LNFS

[6] The "proposal" sent by defendants was not a mutual plan for collection and production, but was instead merely a list of the types of ESI that should be produced.